No. 20137

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HENRY GAMERO, also known as ENRIQUE GAMERO,

Appellant,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES DISTRICT; GEORGE K. ROSENBERG, as District Director,

Appellee.

APPELLANT'S OPENING BRIEF.

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TABLE OF AUTHORITIES CITED

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APPELLANT'S OPENING BRIEF.

Introductory Statement.

This is an appeal from the judgment denying Writ of Habeas Corpus upon Appellant's Petition for the same.

Appellant filed his Complaint for Writ of Habeas Corpus alleging that the Appellant is imprisoned, detained and restrained of his liberty by George K. Rosenberg, District Director, Immigration and Naturalization Service, Los Angeles, California, and said imprisonment, detention and restraint are illegal and unlawful.

Appellee alleged a rightful detention of such Appellant by virtue of its order of exclusion based upon its claim that the Appellant was an excludable alien under 212(a)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(a)(2).

Statement of Jurisdiction.

1. The jurisdiction of the District Court herein is believed sustained by and pursuant to Section 106(b) of the Immigration and Nationality Act of 1952 as Amended, 8 U.S.C. 1105(b).

2. Habeas Corpus is available to an alien seeking to test the validity of his exclusion from the United States. *Jones v. Cunningham,* 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285; *Brownell v. We Shung,* 352 U.S. 180, 77 S. Ct. 252, 1 L. Ed. 225;

3. The jurisdiction of the Court of Appeals to review the judgment of the District Court herein is believed to be conferred by Title 28, United States Code, Section 1291.

4. The pleadings necessary to show the existence of the jurisdiction of the District Court herein is believed contained in the Complaint for Writ of Habeas Corpus of Appellant [Tr. of R. p. 29].

Statement of the Case.

Appellant is imprisoned, detained and restrained of his liberty by George K. Rosenberg, District Director, Immigration and Naturalization Service, Los Angeles, California, within the Southern District of California, Central Division.

Appellant, who was born in Durango, Mexico, on September 2, 1909, claims to be a lawful resident of the United States by virtue of the fact that Appellant legally entered the United States for permanent residence in November of 1916 at El Paso, Texas; has ever since and has been and continuously up to the present time claims to have had his lawful domicile and abode in California.

Appellant is married to one Isabel Martel, said marriage having been consummated at Los Angeles, California, on September 21, 1935. Said wife is a legal resident of the United States and there is issue as a result of said union, being one son, Henry, born on October 10, 1938, at Los Angeles, California. Said son is a citizen of the United States.

Appellant has two United States citizen brothers and a lawful resident sister living in the Los Angeles area.

That on or about January of 1932, appellant's mother was admitted to the Los Angeles General Hospital for an illness described as dementia praecox and was discharged therefrom in February of 1932 as a parole patient.

Sometime in 1932, appellant's mother disappeared and her whereabouts were unknown to all the members of her family, including appellant's brothers and sisters and her whereabouts were unknown for more than ten years.

While appellant was employed in the shipyards at Los Angeles, California, living with his wife and was registered with his local Selective Service Board for military service and attending school to improve his skill as a ship yard worker, in the first part of 1943, appellant and his brothers and sisters were notified by an aunt residing in Mexico that she had seen a person who appeared to be the mother of these persons living under lamentable circumstances in an insane asylum under another name.

Thereafter, a conference was held with all of the brothers and sisters, two of whom were in the Armed Forces of the United States at San Diego, California, and it was decided among them to send appellant to

Mexico City to investigate and determine such existence of their mother.

Appellant made preparation for this trip with the intention of remaining a few weeks in Mexico primarily to ascertain if this person were the mother, and, if so, to make arrangements to return her to the United States and for that purpose Appellant obtained permission from the Selective Service Draft Board to be absent from the United States for a period of a few months.

Concurrently, he also obtained a leave of absence from his employment, a leave of absence from his school, and a certification by the Immigration and Naturalization Service of the United States that he would be permitted to return to his lawful residence of the United States.

Prior to his trip to Mexico City, on or about April, 1943, appellant had resided continuously and lawfully in the United States for more than seven years and has so resided ever since November of 1960.

Appellant went to Mexico City voluntarily to search for and locate his mother and not under any Order of Deportation.

Upon his arrival in Mexico City he went to the insane asylum where the person resembling his mother had been seen and found this person to be his mother and in a most deplorable and lamentable condition, barefooted, clothed in dirty overalls, unbathed, with animals crawling in her hair, sleeping in unclean conditions and having to survive on an inadequate diet.

Appellant immediately made plans to try to return his mother to the United States, at which time he com-

municated with the American Consul in Mexico City and was advised that his mother would not be permitted to return to the United States because she was ineligible for immigration visa.

Appellant believes that she was ejected from the United States by the Immigration Service because of her mental condition and that she was in Mexico City because of the action of the Immigration Service of the United States and in that proceeding was unable to defend or represent herself in the United States. She had been a lawful resident of the United States during her entire stay in this country.

Appellant conveyed all of the information concerning his mother to his family in the United States. When appellant was notified by the American Consul that his mother would be refused a visa to return her to her home with her children, he attempted to make a home for her away from the mental institution and continued his fight and efforts to return her to his home in Los Angeles, California, and he continued these efforts until 1953 when his mother died in Mexico City, without her ever being able to return and be with her children in the United States.

Appellant, who was unfamiliar with the Immigration laws of the United States, relied upon the advice of the American Consul in Mexico City that he was also ineligible to return to the United States and that his mother would have been ineligible to return to the United States.

In appellant's efforts to return to his lawful residence in the United States, he applied at San Ysidro for entry and was refused but subsequently was pa-

roled to the United States by the Immigration and Naturalization Service on or about June of 1961 and he has been physically present in Los Angeles, California, with his wife and family ever since said entry.

Thereafter, and on or about October of 1961, appellee instituted exclusion and deportation proceedings against the appellant and ordered the appellant excluded and deported from the United States, because appellant had no visa, passport, I-151 or other entry documents in his possession, as allegedly required under said Section, 8 U.S.C. 1182(a) (20), and was therefore ineligible to receive a visa and should be excluded from admission into the United States.

Thereafter, appellant appealed the Order of the Special Inquiry Officer to the Board of Immigration Appeals, which appeal was subsequently dismissed.

During November of 1963, appellant appealed to the Board of Immigration Appeals for an Order to reopen and reconsider the application for relief under Sections 211(b) and 212(c) of the Immigration and Nationality Act of 1952. Both the Board of Immigration Appeals and the appellee refused to consider appellant's relief under these Sections and refused to permit appellant to present evidence thereunder or permit the appellant to prove he was a returning, lawful resident of the United States, having had his residence in California for more than seven years.

Appellant has offered to produce additional information and evidence to support his contention that his absence from the United States was temporary and was not for the purpose of abandoning his entry and residence in the United States.

Appellant, having exhausted all of the administrative remedies afforded him, filed his Complaint for Writ of Habeas Corpus in the subject District Court after the appellee had initiated action to enforce the exclusion order and deport appellant from the United States.

That no previous Complaint for Writ of Habeas Corpus has been filed by appellant in this court or in any other court involving the subject matter, except that a Petition for Declaratory Judgment was previously dismissed without prejudice in the subject court, Civil No. 63-1538WM.

Appellee threatens and intends to deport appellant from the United States to Mexico as aforesaid and will do so unless restrained by the issuance of a Writ of Habeas Corpus.

During the pendency of the exclusion proceedings and ever since November of 1959, appellant has been at large under a parole order of the Immigration And Naturalization Service, without bond, and has appeared before the immigration authorities whenever called upon to do so.

Upon the hearing on the Return of the Complaint for Writ of Habeas Corpus, the Court denied the Writ upon the papers, documents and records presented to it and failed to permit the appellant to testify concerning the facts as stated by him and to produce other witnesses who would have testified as to his reason for leaving the United States for Mexico and of his intention that such leave was temporary and not with the intention of abandoning his rights to remain a resident of the United States.

Questions Involved.

1. Was the appellant entitled to a full judicial review in the District Court, including the right to testify as well as to produce other witnesses to testify, such witnesses to be called for the purpose of showing appellant's reasons for his leaving the United States and for the length of this stay in Mexico, to refute the inference and determination by the Immigration And Naturalization Service that he thereby intended to abandon and surrender the right to be considered a returning immigrant only temporarily absent from the United States.

2. Was the appellant denied procedural due process of law and a fair hearing when the Special Inquiry Officer denied appellant the right to produce witnesses, including himself, to testify as to the circumstances as represented by him, to prove the reasons for his absence and thereby to rebut the inference the Officer created that he had so intended to and had abandoned his United States domicile and abode.

3. Was there a showing of substantial evidence when the Special Inquiry Officer and the Review Board rested decision solely upon such inference it created without any other evidence, oral or written, to refute appellant's offers of proof.

4. Is the Finding of the District Court(II) [Tr. of R. p. 18] predicated on "substantial evidence" when it and its Conclusion of Law rest only upon the record of the administrative hearings which are based solely on such inference, and was the District Court affording the appellant a fair review without letting appellant and his witnesses be heard to refute such inference standing alone that appellant intended to surrender the right to be considered a returning immigrant only temporarily absent from the United States.

ARGUMENT.

I.

The Appellant Is Entitled to a Hearing on His Complaint for Writ of Habeas Corpus to a Full Judicial Review of the Administrative Proceedings, Which Includes the Right to Present Evidence of Witnesses Including That of Himself and to Be Confronted by Persons Who Would Testify Against Him and the Right to Cross-Examine Such Witnesses.

Conduct is often capable of several interpretations and caution should be exercised in drawing inferences from it. That solely the length of time that a person is absent from a place of residence or domicile, does not of itself create an irrebutable inference or conclusion that he thereby intended to and did thereby establish an abandonment of that residence and domicile.

Today, the alien in every event is now privileged to proceed with court determination for judicial redress on the question as to whether he has been denied a fair hearing and to which he believes himself entitled.

Truly, the fair concept of a fair hearing is a developing one and yesterday's standards may not be acceptable today, and undoubtedly not in the tomorrows.

The Court can conduct an independent, *de novo* inquest to ascertain the facts where it is claimed that unfair procedure took place at the administrative hearing not reflected in the record, and probe such claim of alleged unfairness and is therefore not limited to scrutiny of the administrative record. *Accardi v. Shaughnessy,* 347 U.S. 216, 98 L. Ed. 681, 74 S. Ct. 499.

Under our form of government, judicial review is not stationary, but the rights it affords are ever expanding and thereby justice fulfills its goal by adapting to changing needs and concepts.

While the courts have repeatedly stated that if there had been a fair administrative hearing, the administrative decision is not open to judicial review, some measure of review has been otherwise established by holding that an unreasonable result is equivalent to an unfair hearing.

A single test is furnished by Section 10 of the Administrative Procedure Act for the review of evidence, providing that an administrative finding may be set aside if it is unsupported by substantial evidence on the whole record.

While there is a question as to whether exclusion proceedings come within the Administrative Procedure Act review provisions, as Section 10 does not exempt from its application those situations where "statutes preclude judicial review", it has been decided that despite the statement that the administrative decision is final, this has not precluded judicial review by habeas corpus, and therefore Section 10 seems to apply. No particular form of proceeding is required under Section 10(b) of the Administrative Procedure Act, which provides that any applicable form of legal action is proper (including habeas corpus).

If so, substantial evidence would seem to be required to sustain the administrative order, even though it is tested by habeas corpus.

Section 10 provides:

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved

by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Section(b) "Every agency action may be reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review . . ."

In Brownell, Attorney General, v. Tom We Sung, 352 U.S. 180, 77 S. Ct. 252, 1 L. Ed. 2d 225.

The Court said:

"Admittedly, excluded aliens may test the order of their exclusion by habeas corpus (p. 183)."

At page 185, the court said:

"Furthermore, as we pointed out in *Pedreiro,* such a cutting off of judicial review" would run counter to Section 10 and Section 12 of the Administrative Procedure Act. 349 U.S. 51.

"Exceptions from the . . . Administrative Procedure Act are not likely to be presumed," *Marcello v. Bonds,* 349 U.S. 302, 310 (1955) and unless made by clear language or supersedure, the expanded mode of review granted by that Act cannot be modified. We, therefore, conclude that the finality provision of the 1952 Act in regard to exclusion refers only to administrative finality.

The pertinent sections of the Immigration And Nationality Act, 8 U.S.C. 1182 reads:

"General classes of aliens ineligible to receive visas and excluded from admission: (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(2) Aliens who are insane;

. . .

(20) Except as otherwise specifically provided in this Act, any immigrant who at time for application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to Section 211-(e), [1181(e) of this Title.]"

An alien is entitled to procedural due process of law which means that the hearing must be conducted fairly.

One element of due process is the requirement of a fair hearing. The alien in every event is now privileged to proceed with Court determination for judicial redress on the question as to whether he has been denied a fair hearing and to which he believes himself entitled. Our Supreme Court has made it clear, sometimes only by inference, that exclusion of non-enemy aliens can be accomplished only after they have been accorded procedural due process of law.

More explicitly, the Supreme Court has held that an alien whom it sought to exclude from the United States must be given a fair hearing with a right to establish his right to enter.

That of itself alone, the length of time that a person is absent from a place of residence or domicile, does not create such an inference or conclusion that he thereby intended to and did abandon his residence and domicile.

Relinquishment of domicile, which bears a close relationship to continuity thereof, depends ultimately on the intent of the alien, and since it is a question of fact

for the immigration authorities, the finding on the question of fact will not be reversed in the courts if it is supported by any *substantial evidence.* (Italics ours). *U.S. Illuuzzi v. Curran* (C. A. 2 N.Y.), 11 F. 2d 468.

The decision in *U.S. ex rel. Lindenau v. Watkins* (1947, D.C. N.Y.), 73 F. Supp. 216, is noted for its definition of "substantial evidence": Substantial evidence is of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference of facts which is sought to be sustained. It implies a quality of proof which induces conviction and which makes a definite impression on reason. It must be more than a scintilla of evidence and more than suspicion or surmise. It must be more satisfying than hearsay or rumor. Mere rags and tatters of evidence are not sufficient. Some courts have gone so far as to say that evidence subject to either one of two inferences is not substantial. The test in determining what constitutes substantial evidence in an administrative proceeding is the same as that applied in trials by jury.

Appellant departed voluntarily from the United States not under an Order of Deportation. His reasons for this departure — his reasons for his long stay away — his desire at the time to return his mother to Los Angeles, if proven by his testimony and other witnesses could overcome, if believed, any inference that he so abandoned his United States residence and domicile.

Furthermore, he had a wife who is a lawful resident alien and a son who is a United States citizen by birth. All of his immediate family are citizens and lawful residents of the United States.

All of these factors would tend to prove his true intentions resulting in his voluntary departure and absence from the United States.

It is a far more reasonable rationalization to interpret his conduct by his and others testimony of this then intent surrounded by these material circumstances than to close the mind by concluding that as did the Special Inquiry Officer, that such conduct in absence is capable of only one arbitrary conclusion, being that solely by the length of its duration he could only have intended to abandon his American residence and domicile.

There is no evidence whatsoever which has been produced at any hearing which would show a contrary intention on the part of appellant, but the decision of the administrative hearings depends solely upon such inference based solely on absence of time.

Appellant was not afforded a fair hearing either in the administrative hearings or before the District Court nor was any of their decisions based on "substantial evidence", for their decisions stand naked — without regard or consideration of all of the evidence which could be produced — the other factors and facts that combine to make "intention". Such decisions stand isolated and alone on an erroneous conclusion of both law and fact that a long absence results in but one arbitrary inference (as each of them so determined) — an irrebuttable inference or presumption that the appellant had intended to thereby have abandoned his American residence and domicile.

In fact, the actual decision of the District Court upon which its Conclusions of Law are predicated [Tr. of R. p. 15] states that the Court is warranted in

drawing the inference by such long absence that appellant intended to surrender his right to be considered a returning immigrant only temporarily absent from the United States.

Even under the proceedings and documents standing alone as the evidence in the instant matter, and due consideration of all of them, can it be said that the decisions of the administrative hearings (and therefore in the District Court) are predicated on substantial evidence. Do they not rest solely upon the inference that time alone is the deciding factor and only factor in a determination of the intentions of such absent alien?

In *Shaughnessy v. Pedreiro,* 349 U.S. 481, 99 L. Ed. 868, 75 S. Ct. 591, the Supreme Court stated at pages 51 and 52,

> "The legislative history of both the Administrative Procedure Act and the 1952 Immigration Act supports respondent's right to a *full* judicial review."

A full judicial review can mean only one thing and that is a right to a full hearing not on the examination of the administrative record presented to the District Court on a Writ of Habeas Corpus, but the right to present evidence by witnesses, cross-examination, a full trial covering the issues. There must be an evidentiary hearing in the District Court (unless only a question of law) to determine upon all of the evidence whether the alien was afforded a fair hearing before the administrative agency and is its decision supported by substantial evidence.

In proceedings such as these exclusion matters, it must be kept constantly in mind and ever realized that the

liberty of such alien is at issue — not only his right to live and remain in the United States, but his right, hope, all else, to be allowed to remain with his wife and child, all else that remains of his immediate family now that his mother is deceased which was his then urgent reason for remaining in Mexico.

Again, it must be stressed that at the administrative hearing no evidence was presented by the United States refuting the facts and proof offered of appellant, but reliance was had solely on inference. No evidence, oral testimony, or documentary in nature, was offered by the government which would have refuted and contradicted the contentions of appellant.

Thus we have such inference standing alone to overcome the offers of proof of appellant. It is therefore our contention that an unresolved issue of fact still exists, that the conduct of the appellant is capable of two inferences, and that the District Court should be required to hold a full judicial hearing and determine the truth on the facts and not on the inference alone of absence.

We have assumed that the Judgment of the District Court, on its Findings of Fact and Conclusions of Law intended to reflect Section (a)(20) of 8 U.S.C. 1182, rather than Section (a)(2) thereof for under the latter section no issue was ever created at anytime of the sanity of appellant.

With respect to Section (a)(4) appellant contends and offered to prove that he had no form W-1-151 as none was in existence by regulations of the Immigration Service when the appellant went to Mexico in 1943, and further no passport was required under the cir-

cumstances in this case of appellant because he had a citizen child and his spouse was a resident of the United States (Sec. 2112-8 C.F.R.).

It is also contended that a Judgment based on an erroneous Conclusion of Law such as the section stated is not valid but in view of the fact that appellant would only be entitled to have this case remanded for further proceedings if this Court should so reverse, we believe that such error might be considered as immaterial.

However, we wish to emphasize that the District Court's decision [Tr. of R. p. 15] is likewise predicated solely on a similar inference drawn by it on the bare record (absence of testimony) and no other evidence was considered by the District Court, it also relying upon an inference of long absence as to appellant's intent.

We desire now to re-examine the proof to be offered by the appellant, to which there has been offered by the government no conflicting testimony. The reasons and circumstances of his sudden trip and absence cannot be disputed. His intent in remaining as long as he did will be substantiated by the facts as presented by himself, his witnesses, and documentation. We believe that all of his conduct is capable of only one reasonable conclusion and inference.

Mr. Gamero requests only the opportunity to present evidence in a Court of competent jurisdiction to explain the reasons for his absence from the United States and to present proof that he at all times maintained his residence in the United States from the time of his original entry in 1916 through the difficult years in his life from 1943 to 1953 with his mentally unbalanced mother and continuing until 1961 during which years

he was fighting for his right to return to his domicile in Los Angeles, California and up to the present time.

Mr. Gamero has never been afforded the opportunity of presenting this evidence in any tribunal either in a court of law or before the administrative hearing officer of the Immigration Service.

In 1943, Mr. Gamero was a lawful resident of the United States with his citizen child and lawful resident wife. He had two younger brothers in the Armed Forces of the United States. Imagine the emotional impact when, after 11 years of silence, the family was suddenly informed that their mother had been located in a mental institution in Mexico. At an emergency council of the children, Mr. Gamero was selected as the logical one to travel to Mexico to verify the authenticity of the rumors concerning the existence of their mother. It was logical to select him because he was not in Military Service. He was married with a minor child. He was in a deferred status which rating would not adversely affect the progress of the war. So he went on the emergency trip of mercy.

His intent obviously was to retain his residence and domicile in the United States. The courts have held intent is a fact to be determined from the surrounding circumstances. What did Mr. Gamero do? He took a temporary leave of absence from his employment. He took a temporary leave of absence from his school. He obtained permission from his Draft Board for a temporary absence. He carried with him, his Immigration Identification Card authorizing his return to the United States.

His economic status in the United States as compared with conditions in Mexico obviously was superior. These actions, determined by the surrounding circumstances, emphasize the conclusion that his intent was to return to his abode in Los Angeles as soon as possible.

Imagine the emotional shock when, upon arriving in Mexico, he identified his mother living in the twilight zone of mental disturbance, not recognizing her own son, and the shock of the physical appearance of his mother in the animal condition of her surroundings. He states that he found his mother with dirt encrusted hair and lice, animals crawling on her skin, and required to reside in primitive conditions with unclean bedding in a foul smelling habitation. This, after 11 years of unexplained absence, completely unnerved Mr. Gamero.

His first reaction was to remove her from these nonhygenic surroundings and bathe and clothe her in respectability and dignity because she was his mother.

All of these facts Mr. Gamero offers to prove in a fair hearing to show his residence in the United States and his intention to retain his residence at the time of his departure.

After realizing his first plan of attempting to rehabilitate his mother, he proceeded to inquire of the delegated authority how to effect her return to her family in Los Angeles. This phase of his life begins the long battle on trying to reunite his family. Upon inquiry at the American Consulate, he was told that his mother could not return to the United States because of her mental condition. Mr. Gamero continued his efforts to establish that his mother was in Mexico against her will and probably because of unorthodox action taken by the agencies in the United States. He persisted

in his efforts to obtain authorization for his mother to enter the United States up to the time of her death.

These facts all negate any presumption or inference that there was an intent to abandon residence in the United States.

Mr. Gamero then became confronted with additional obstacles when he was told informally by the Consulate that he could not return to the United States because he had remained in Mexico beyond the period authorized by the authorities. Comprehending the significance of this advice, Mr. Gamero became severely disturbed. He continued his fight to establish the authenticity and legitimacy of his right to return to the United States to his unrelinquished domicile in Los Angeles with his family. He sought to submit evidence explaining the surrounding circumstances of his departure to Mexico to locate his mother and remove her from the mental institution where she was confined. He has never been afforded this opportunity. He seeks the opportunity now through a reopened hearing to establish the foregoing facts and to establish that he is a returning lawful resident of the United States.

The trial judge refers to the absence of Mr. Gamero from the United States as creating an inference that there was an abandonment of his domicile in the United States. If the facts were taken in their entirety, considering the surrounding circumstances at the time of the appellant's departure for Mexico, the only logical inference or conclusion to be drawn from Mr. Gamero's conduct is that his intention was always to return to the United States.

Every fact points to that conclusion. He has a citizen son presently registered with the Military Service. He

has three brothers and sisters with honorable discharges from the Armed Services of the United States. Having come to the United States at seven years of age, he was the product of American education and background, with no economic, social or family ties in Mexico. He had led an exemplary life prior to 1943. His motives in attempting to rescue his mother were exemplary. His conduct in perfecting his return with his mother to the United States was laudable. There is nothing derogatory in any of his activities, either in the United States or in Mexico. In fact, his conduct before and since 1943 has been unimpeachable.

The appellant, Mr. Gamero, pleads for the opportunity to submit evidence to establish that he is now and always has been a resident of the United States since 1916; that he is a returning resident to an unrelinquished domicile in the United States; that it was his intention to retain his residence in Los Angeles when he journeyed to Mexico in 1943 to locate his mother for the purpose of returning her to the family residence in California. When the surrounding circumstances of his departure to Mexico are considered, the only intent that can be reasonably inferred is that he retained his residence and domicile in the United States. Mr. Gamero deserves and we believe he is entitled under the law to the opportunity to present this evidence.

This Court in order to affirm the decision of the District Court and approve the action in the administrative hearing will have to take the position and say that such absence cannot be explained as a matter of law because there arises an irrebuttable presumption of intention to abandon residence and domicile regardless of what such alien could say or prove. We know of no such

statute which creates such a presumption. Furthermore, at what point of time can the Special Inquiry Officer arbitrarily determine you have stayed too long in our sole judgment, and we are not interested in any explanations or reasons as they would make no difference even if true, for we now presume and infer that your particular length of stay is sufficient for us to stamp you with such intention of abandonment of domicile or residence.

To take any other view, the District Court as well as the administrative proceedings must afford such alien a right to be heard and to explain his conduct by testimony of himself and his witness before finally placing the stamp of exclusion upon him. The alien is entitled to this right—the belief or disbelief and weight to any evidence so adduced is for the trier after consideration of all of the evidence from both parties.

Conclusion.

The District Court should have granted a full judicial hearing permitting the appellant to introduce testimony of himself and other witnesses to rebut such arbitrary inference and for the express purpose of ascertaining whether appellant was afforded a fair and full hearing and to determine further, whether the decision of the Special Inquiry Officer is supported by "substantial evidence".

Under these circumstances, and under the law and facts, we believe that the judgment should be reversed with the cause remanded to the District Court in accordance with the views and reasons expressed herein.

Respectfully submitted,

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Of Counsel:
NORMAN B. SILVER.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN F. SHEFFIELD,